Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF
UNITED STATES

_____ TERM

NO. 78-816

DAVID BELL APPELLANT

VS.

NEW YORK STATE LIQUOR
AUTHORITY APPELLEES

APPEAL FROM NEW YORK STATE COURT OF
APPEALS

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Cases

Gragnia vs City of Rockford
(408 US 109)

California vs La Rue
(409 US 109)

Cootes vs. Cincinnati
(406 US 611)

Gregory vs Chicago
394 US 111)

Rose vs. Locke
(423 US 48)

Beal Properties vs State Liquor Authority
(37 NY 2d 861; 45 Ad 2d 908)

STATUTES

Section 106 subd. 6 of the New York State Alcoholic Beverage Control Law

JURISDICTIONAL STATEMENT

1. a. On April 6, 1978, the Appellate Division, Third Department of the Supreme Court of the State of New York, dismissed appellant's petition appealing the decision of the State Liquor Authority, which revoked appellant's license to dispense alcoholic beverages, in an order of respondent, dated January 8, 1976. (Appendix pages 1,2.)

b. This is an appeal from an order of the New York State Court of Appeals, dated June 8, 1978 (entered in the office of the Sullivan County Clerk, June 14, 1978) which denied his motion for leave to appeal the judgement of the Appellate Division, Third Department; which upheld the order of the New York State Liquor Authority revoking appellant's to sell alcoholic beverages in the restaurant he leased and operated in 1975. (App. Pg. 3)

The Notice of Appeal was served on respondent on June 22, 1978 and filed on that day in the Appellate Division, Third Department of the New York State Supreme Court in the office of the clerk of that court. (Appendix page 4.)

The statutory provision believed to confer jurisdiction on this court is provided by Title 28, section 1257 subd. 2 of the United States Code of Judicial Procedure; by which appellant draws into question the validity of section 106 subd. 6 of the New York State Alcoholic Beverage Control Law, on the grounds of it's being repugnant to the Constitution and laws of United States, and the decision of the State Court is in favor of it's validity. (Appendix pg. 5)

Appellant believes that the following cases sustain the jurisdiction:

Gragnia vs City of Rockford
(408 U.S. 109)

California vs La Rue
409 U.S. 109

Cootes vs Cincinnnati
406 U.S. 611

Gregory vs Chicago
394 U.S. 111

Rose vs. Locke
423 US 48

STATEMENT OF THE CASE

Appellant, David Bell, was licensed by New York State Liquor Authority in 1973, 1974 and 1975 to operate a restaurant dispensing alcoholic beverages. Licensee provided entertainment in the lounge in the form of female entertainers who danced with little or no clothes.

In August 1974, the authority brought charges against appellant- licensee, under section 106 subd 6 of the New York State Alcoholic Beverage Control Law. It was alleged he suffered or permitted the premises to become disorderly by permitting alleged lewd entertainment.

At the same time, six other licensees situated in the same county, who featured the same kind of entertainment, were also cited under the same statute. In the administrative hearings held by the Authority, subsequently, appellant and the six other licemsees raised the point that no local ordinance, state statute or rule or regulation of the Authority prohibited nude dancing or defined disorder or lewdness. At these hearings in 1974, appellant first raised the question of the constitutionality of sect. 106 subd. 6 of the ABC Law. The question was ignordd by the presiding administrative judge.

No further action was taken by the Authority after these hearings in 1974 and no warnings were directed to appellant to discontinue this form of entertainment; and his license was renewed.

In August , 1975, new charges were made against the appellant under the same statute, and new hearings were held by the Authority on these new charges, in August and October of 1975. In January, 1976, the Authority revoked petitioner's license and fined him $ 2,000.

In appellant's appeal to the Appelate Court of the aforementioned order by Authority, the question was again raised that sect. 106 subd. 6 of the ABC Law was unconstitutionally vague. The appellate court upheld the administrative order and fine and summarily dismissed the constitutional question (Opinion of court, App. Page 1,2)

The Court of Appeals of the State of New York denied appellant's petition for leave to appeal. (Appendix Page 3)

SUBSTANTIALITY OF FEDERAL QUESTION

Appellant believes that the Federal question is substantial, and because the relevant pleadings and testimony of the hearings are voluminous, a plenary session of the Court with briefs on the merits would be necessary for a full understanding by the Court of the question presented by this appeal. Appellant bases this belief on the following grounds:

1- The Supreme Court, in the past, has consistently struck down state statutes which are vague and fails to clearly define prohibited conduct (of the kind which appellees allege violated sect. 106 subd 6 of the New York State ABC Law.

> " A statute is void for vagueness if it fails to give a person of ordinary intelligence notice that his contemplated conduct is forbidden by statute".
>
> (423 US 48)

The record clearly shows that no local ordinance, state statute or rule or regulation of the State Authority prohibited the type of entertainment provided by appellant - in 1974 and 1975- which appellees alleged was prohibited by the aforementioned 106-6 of the ABC law, and constituted disorder.

> " A vague law impermissibly delegates basis matters to policemen, judges and juries for resolution on an Ad Hoc basis".
>
> (Gragnia v City of Rockford; 408 US 109)

2- A collateral issue relevant to the instant proceedings by the Authority against appellant, concerns 6 other licensees situated in the same county as appellant (Sullivan), who also provided the same kind of entertainment and were prosecuted under the same statute.

Of the aforementioned six, one - namely Beal Properties- had been previously prosecuted in 1972 under the same statute, for providing the same entertainment, and had their license suspended. In this case, (Beal Properties vs. State Liquor Authority, 37 NY 2d 861, 45 AD 2d 908, 1975) on appeal to the New York State Court of Appeals. the court reversed the order of suspension; on the grounds that "no regulations proscribing nude entertainment had been promulgated at that time" (in 1972 or 1975). (see California vs. La Rue, 409 US 109)

In response to this ruling, the Authority set up guide lines and ex post facto regulations proscribing this kind of entertainment - late in 1975 - and only after the prosecution of the appellant and six other licensees in Sullivan County. (see footnote 1)

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f1- of the six other licensee

3- At the administrative hearings held by Authority in 1974 - of appellant and six other licensees- offers of proof of discriminatory and selective enforcement by Authority, and made by all licensees, was denied by presiding administrative judge. In appellant's later appeal, the appellate court upheld the Authority (on the grounds that proof was lacking, while at the same time denying appellant's motion for appointment ofa referee to consider the proofs offered. (An excellent example of the proverbial catch 22 of army fame)

" If arbitrary and discriminatory enforcement is to be prevented,

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f-1 cont. - charged in 1974, the Authority assessed suspensions and fines against all six. Three of the suspension were later reversed in the appellate court, and 3 others were sustained by the appellate court, including the appellant.

laws must provide explicit standards to those who apply them."

(Cootes v. Cincinnati, 406 US 611; Gregory v. Chicago, 394 U.S. 111; Interstate Circuit v. Dallas, 390 US 676)

CONCLUSION

The record is clear, that in 1974, the rules and regulations of the Liquor Authority lacked a clear definition of what constituted disorderly conduct and lacked a proscription of the entertainment provided by appellant licensee; and which permitted the Authority to selectively prosecute appellant and six other licensees in Sullivan County, on an ad hoc basis, clearly prohibited by the constitution and laws of United States. (California v. La Rue, supra)

The appeal should be considered by the Court after a plenary session, and the statute declared unconstitutionaly vague, and null and void.

Appendix 1

Supreme court
Appellate Division

April 6, 1978 29941

In the Matter of David Bell, Petitioner
v.
State Liquor Authority, Respondent.

Proceeding pursuant to CPLR article 78(transferred to this court by order of the Supreme Court at special Term, entered in Sullivan County)to review the dtermination of the State Liquor Authority which (1) suspended petitioner's liquor license for a period of 30 days and directed forfeiture of his bond in the sum of $ 1,000; (2) revoked petitioner's license, together with forfeiture of his bond in the sum of $ 1,000; and (3) directed nonrenewal ofpetitioner's license for a period of two years.

In this proceeding, petitioner seeks review of two dterminations made by respondent following statutory hearings. The first, rendered October 16, 1975, found petitioner in violation of subd. 6 of section 106 of the Alcoholic Beverage Control Law when he had permitted his licensed premises to become disorderly on July 13 and 14 of 1974 in that he permitted lewd and indecent performances thereon. The second, rendered January 8, 1976, found petitioner in violation of subd. 6 of section 106 of the ABC Lawby permitting his licensed premises to become disorderly on July 3 and 4th of 1975 in that he (1) permitted

patrons and/or employees to bring upon the licensed premises narcotics and/or dangerous drugs; (3) he permitted solicitation for immoral purposes on the licensed premises; and (4) he permitted thelicensed premises to be used for the purposes of promoting prostitution thereon. Respondent further found that the " conduct of the *** (petitioner) lea ding to his arrest on July 4, 1975 for violations of Sect. 120.25 of the Tenal Law of State of New York (Reckless Endangerment-first degree) Section 110.00 of the Penal Law of N.Y. (Attempy to commit a crime- Murder first degree); section 195.05 of the Penal Law of N.Y State (Obstructing Governmental Administration) and Sect. 205.30 of the Tenal Law of N.Y.S.(Resisting Arrest) was of suchimproper nature as to warrant revocat-cancellation or suspension of his license pursuant to Rule 36, Paragraph N of the Rules of the State Liquor Authority".

The evidence adduced at the hearing revealed that the female entertainers danced completely naked while moving their hips and pelvic areas. They then laid down on the stage on their backs and spread their legs toward various patrons and placed their pelvic areas in close proximity to the faces ofthe patrons. The investigators testified that they were able to observetheir vaginal areas surrounded by pubic hair. Unlike the situation in the Matter of Beal Props v. State Liquor Auth.(45 A.D. 2d 906, revd. 37 NY 2d 861) the activity here found to be indecent or lewd " per se" by the Authority and it is obvious that the activity engaged in was more than nude daneing.

Under identical circumstances, the Fourth Dept. upheld the State Liquor Authority's detrrmination that such conduct was a violation of sect. 106 of the ABC Law (Matter of Inside Straight v. State Liquor Authority 56 AD 2d 720), and the Court of Appealsrefused to grant leave to appeal (37 NY 2d 861).

In regard to the findings pertaining to the narcotics charges, permitting the solicitation for the purposes of prostitution upon the licnsed premises and the conduct of the licensee leading to his arrest for reckless endangerment, attempting to commit murder,obstruction governmental adminsitration and resisting arrest, these presented questions of credibility which were for the respondent to resolve. In connection with the the criminal charges, we note thatthe petitioner was convicted on April 20, 1976 in Sullivan County of the crimes of reckless endangerment in the second degree, a class A misdemeanor, in violation of sect. 120.20 of the Penal Law of N.Y. State, and the charge of resisting arrest, a class A misdemeanor, in violation of sect. 205.30 of the Penal Law of N.Y. State. these convictions were affirmed by this court (People v Bell, _____Ad 2d ____ Dec. 29 1977).

We conclude that respondent's determinations of lewdness andindecency of the dance performances, as well as the remainder of the charges are supported by substantial evidence in the record and

the dterminations of the respondent must therefore be uphled.

Petitioner argues that his rights are being violated in that the laws are being selctively enforced to his detriment. This hardly seems likely in view of the frequency which these cases have reached the courts. But in any case, petitioner has presented no evidence of selctive enforcement.

We have examined the remainder of petitioners contentions and find them without merit. Under all circumstances, we feel the penalty was appropriate.

Dterminations confirmed, and petition dismissed without costs.

Mahoney, P.J., Greenblott, Main, Mikoll and Herlihy, J.J. concur

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court held at the Court of Appeals Hall, in the City of Albany, on the 8th day of June, 1978

PRESENT, Hon. Charles E. Bretel
Chief Judge, presiding

Mo. No. 407
In the matter of the application of
David Bell, Appellant,

For Judgement &c
vs.
State Liquor Authority, Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part ofthe appellant herein and papers having been submitted thereonand due deliberation having been thereupon had,it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Clerk of the Court

Appendix 3

Court of Appeals
State of New York

In the matter of the Application
of David Bell, Petitioner

For Judgement, & c
vs.
State Liquor Authority, Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT
OF UNITED STATES

Please take notice, that the above named petitioner hereby appeals as of right as provided in Title 28 sect. 1257 subd. 2 of the U.S Code; to the Supreme Court of the United States, the decision of the New York State Court of Appeals, entered on June 14, 1978. which denied his motion for leave to appeal, the decision of the Appellate Division, Third Dept. , which affirmed the judgement of the State Liquor Authority, which revoked and suspended the license to disperse alcoholic beverages, issued to him.

Dated; June 22, 1978

David Bell
Petitioner, pro se
P.O. Box 130
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To:
Louis Lefkowitz, Attorney
General, State of New York
State Liquor Authority
Clerk of the Appellate Court
Clerk of the Court of Appeals

Section 106 subd. 6 of the New York State Alcoholic Beverage Control Law states:

" No person licensed to seal alcoholic beverages shall suffer or permit gambling on the licensed premises, or suffer or permit such premises to become disorderly".